IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No................

BEE RAY and NATHAN FORBES, doing business as Superior Uniform Cap & Shirt Mfg. Co.,

Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent.

BRIEF IN SUPPORT OF THE PETITION.

ARGUMENT.

I.

The Complaint Fails to State a Claim for Which Any Relief May Be Granted.

One of the great rights of a citizen is not to be sued, and if a suit is commenced, another right is not to be forced to go through lengthy litigation at great expense. A person against whom a suit for a penalty has been filed by the Government is entitled to know the facts upon which that suit is based, so that he may, within the period fixed by the rules, move to dismiss the claim for failure to state a claim upon which relief can be granted. Otherwise he is forced through a lengthy trial and lawsuit,

without any relief. A suit for penalty is similar to a charge of crime on which a financial penalty may be inflicted. Where a crime is charged, sufficient facts must be stated in an indictment or information to support a conviction. In *United States v. Johnson* and eleven other cases, the District Court of Delaware, October, 1943, said:

> "(9-11) II. Sufficiency of Indictments Under Regulation 269 in Effect Prior to April 22, 1943. Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and pertinent administrative regulations passed pursuant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. *Fontana v. United States,* 8 Cir. 262 F. 283; *Lynch v. United States,* 8 Cir., 10 F. 2d 947; *United States v. Armour & Co.,* 48 F. Supp. 801; 27 Am. Juris. p. 621. The purpose of such requirements is to give a defendant the fair opportunity to prepare his defense and enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime. The indictments charging violation of Regulation 269, as it existed prior to April 22, 1943, are clearly insufficient to meet these essential requirements. It is impossible to glean from the allegations of each indictment, the Act, and the regulations what, in fact, the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling for the commodity *sub judice,* defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner

in which it arrived at this conclusion. It may be that the Government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists."

If this information is not furnished to the defendants in the original complaint, then the defendant is forced to litigation, which may be without any foundation, and of which he has the right to be exempt.

The complaint in this case consists of sheer conclusions of the pleader and gives not a single fact from which the Court can assume jurisdiction in the case. Responsive pleadings or a motion to dismiss under the rules are required within 20 days and if that motion is not granted then the defendant is forced to a lengthy and expensive trial. It has ordinarily been held that in the complaint where diversity of satisfaction is involved and $3,000.00 or more is required to be the basis of a suit in the Federal Court, that these facts must at least be alleged so that the Court may see in the first instant that it has jurisdiction. Jurisdiction is not conferred merely by an allegation that the parties have a diversity of satisfaction, but the actual diversity facts must be alleged. Also, in cases involving penalty or forfeiture, the Court and the accused is certainly entitled to facts upon which the Court may determine that it has jurisdiction of the subject matter and whether to proceed. Here nothing is set forth except a statement of the pleader that the defendants sold and delivered brass emblems for garrison caps to their customers, demanding and receiving a price or consideration for each brass emblem for garrison caps in excess of the maximum price therefore established. No fact is set forth upon which the Court could determine

the price charged or the price which was proper to be charged nor the name of the customer or customers or his business so that the Court could determine whether the purchase was made by someone buying a purchase for himself or by a dealer or someone else. The effect of such proceeding is to compel a trial where the trial may not be warranted.

Section 205(e) is an unusual statute. It confers jurisdiction on the Administrator only in the event certain conditions precedent have not occurred. It confers jurisdiction only after a certain period of time on the Administrator and within a certain period of time. It is penal insofar as the suit of the Administrator is concerned. Therefore, the Government should be required to set forth the jurisdictional facts in its pleadings or it should be held that no claim has been stated for which relief may be had. This is so that the Court may, in the first instance, determine whether the jurisdictional facts exist and whether the conditions precedent exist and whether the action is one that gives the Administrator any cause of action.

The meaning of the expression "in the course of trade or business" is too vague, indefinite and uncertain to form the basis of criminal conduct or for the imposition of a penalty. This point is presented in the brief of *Glick Brothers Lumber Company, et al. v. Chester Bowles*, Administrator, Office of Price Administration, filed along with this case. The petitioner wishes to add the following:

II.

The Statute Is So Vague and Indefinite as to Be Void Under the Fifth Amendment of the Constitution of the United States. The Phrase "in the Course of Trade or Business" Is Too Vague to Form a Penal Standard.

Under Section 205(e) the penalty is *not* imposed by reason of an "overceiling sale." The imposition of the "penalty" comes about only as to *some* overceiling sales—but *not as to others.* Under Section 205(e) no "penalty" can be imposed in any instance or under any circumstance, even though the sale was at overceiling price, **unless** the sale was made to a buyer who purchased "for use or consumption in the course of trade or business."

An overceiling sale to any buyer who purchased "for use or consumption **other** than in the course of trade or business," does not, and under the language of the section cannot under any circumstance result in the imposition of any "penalty." Such an overceiling sale merely gives rise to a cause of action in favor of the overcharged purchaser for "remedial" or "compensatory" damages; but under Section 205(e) as it existed prior to July 1, 1944, no "penalty" accrued, or could possibly accrue against any seller on account of any sale made to a buyer who purchased "for use or consumption **other** than in the course of trade or business," regardless of whether the sale was, or was not, at an overceiling price.

It is of course true that if no overceiling sale was ever made, then obviously no penalty could ever accrue, or be imposed against the seller; and it is equally true that if the seller *made no sales at all,* then no "penalty" could ever accrue or be imposed against him. However those

are not the acts or tests (or standard of conduct) specified in the section **as giving rise to the imposition of the penalty.** Accordingly it is an erroneous and inaccurate for the Government to argue that a seller can avoid the imposition of any penalty by refraining from making overceiling sales, as it would be to argue that the seller could easily avoid any possibility of penalty if he refrained from making any sales at all; or as it would be to argue that where a vague, indefinite and uncertain traffic ordinance provided a penalty for its violation, the motorist could not be heard to complain of its uncertainty, or attack its constitutionality, because the motorist could easily avoid all possibility of the imposition of the panalty prescribed in the vague and uncertain traffic ordinance, by the simple expedient of staying off the highways. Let us assume that a traffic ordinance prohibited generally the use of a certain way, and provided that if used in disregard of the prohibition the only liability upon the user under some circumstances would be remedial damages in favor of such adjoining property owners as might sue for the same; but if the way was used under other circumstances, the user should be liable to a punishment in the way of a penalty or fine payable to the state; and the language of the ordinance as to the circumstances under which the user becomes liable for remedial damages to the adjoining landowners, and those under which he becomes liable to the penalty or fine, are so vague, indefinite, uncertain or garbled that it is capable of, and actually receives various and conflicting interpretations from different people and even from different judges. In such a case would the Government argue that the motorist could not be heard to complain of the vagueness and uncertainty of

the penal provision of the ordinance, because the motorist could easily avoid the punishment or payment of the fine to the state by the simple expedient of remaining off the way altogether? That is exactly what the Government is arguing in the case at bar.

Of course Congress *could* have provided in Section 205(e) that *all* overceiling sales should result in the imposition of a "penalty" against the seller,—but it did not do so in Section 205(e) of the act as it existed prior to July 1, 1944.

Under section 205(e) however, as a condition precedent to the bringing of the action, it is necessary for the Administrator to show that the buyer could not bring the action. In the interpretation of the section given by the government, both buyer and seller would be in bad faith, and both buyer and seller being in bad faith, would have no right to bring an action.

In the light of the fact that the cause of action vests in the United States and in the buyer, under these circumstances the question is open as to whom the action might proceed against and under what circumstances. Such vagueness and indefiniteness has occurred heretofore in the Emergency Price Control Act.

In *Davies Warehouse Company v. Bowles*, 88 L. Ed. 381, the court said:

> "Congress, in omitting to define 'public utility' as used in the Act, left to the Administrator and the courts a task of unexpected difficulty. Use of that term in a context of generality wears an appearance of precision which proves illusory when exact application becomes necessary."

An examination of section 205(e) shows the same illusory character in the entire section.

Congress has not defined what persons are persons who buy commodities for use or consumption other than in the course of trade or business. It has not defined whether the person who, in violation of the law, pays a price over the ceiling, may still bring an action either for $50.00 (or $25.00) or for treble the amount by which he paid the applicable maximum price, whichever is the greater, plus attorney's fees and costs, as determined by the court.

Since it appears that a person going into a market and paying a price over that fixed by the regulations, is equally a violater of the law and equally destroys the purposes of the law seeking to prevent inflation (he not being like a laborer or a contractor who has been damaged by failure to pay him his proper wages), is not entitled either in the interests of the Act nor otherwise, to be rewarded for violating the law.

But the section, which is so illusory in its definition, continues to state, "If the buyer is not entitled to bring suit or action under this subsection"—without saying when the buyer is or is not entitled to bring suit under this subsection, "the Administrator may bring such action under this subsection on behalf of the United States."

This again leaves to conjecture when or how the buyer is or is not entitled to bring an action. It leaves to conjecture under what circumstances the buyer might be sued under this subsection, or whether he, as well as the seller, shall be joined in an action brought by the Administrator. It further leaves in doubt and to conjecture the kind of an action that the Administrator may bring and how he may bring it, and whether the language of the statute means an action for $50.00 or for treble the amount.

1. The term "black market" has a very popular and general meaning, and refers to a person engaged in the illicit traffic or who is a bootlegger.

The District Court's opinion receives full support in its view of the black market suppression as set forth in Senate Report 931, which points out that the action was given to the Administrator in cases "in which the buyer is barred for bad faith." Thus a buyer would be barred for bad faith if he traded with a bootlegger in the illicit market. The interpretation which the District Court places upon the statute is the only logical interpretation which can be placed on this section. Any other interpretation would require this court to hold the section entirely unconstitutional and void.

In respect to the purposes for which the section was designed we have previously stated that the section, under the heading of "Enforcement" was referred to as a "damage" action. However, the action is in no wise for "damages." That this portion of the section is entirely illogical and not within the scope of congressional intent, is clearly shown by the fact that Congress fixed for a wilful violation of the statute by one guilty of a crime, a maximum fine of $5,000. However, under this section proceedings have been instituted running into millions, and civil actions have been filed for amounts running into thousands of dollars and far beyond the maximum penalty in a wilful case, without any requirement that the alleged violation be either wilful or in bad faith. This does not comport with congressional intent, and was not the purpose and object of the statute.

As said in *Davies Warehouse Company v. Bowles,* 88 L. Ed. 379, 383,

> "Where Congress has not clearly indicated a purpose to precipitate conflict we should be reluctant to do so by decision . . . At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden, but one implied by the terms of the legislation when viewed against the background of our form of government."

Nowhere in the history of our government have there been such exorbitant penalties sought to be enforced, in the guise of administration. Where, under some circumstances, the government has been actually defrauded of money by failure to pay a tax, or where duties imposed by law have been evaded, certain penalties have been imposed. However, the object of the Emergency Price Control Act was not to place upon business men and corporations large penalties not fixed by Congress and not sanctioned by precise statutory enactment. Had Congress intended such penalties as have been attempted to be exacted under section 205(e) of the Act, it would have been at no loss of words to say so in clear, unmistakable language. This it has not done.

The Administrator has therefore taken upon and delegated to himself the power, not clearly and definitely granted by Congress.

Penal statutes which enforce the penalties of the character and magnitude which have been sought to be enforced under this Act are not to be inferred, but must be clearly and positively stated by Congress.

In Section 205(b) of the act, Congress *did* provide for the imposition of a penalty (fine and/or imprisonment) for each and every wilful overceiling sale, regardless of who the purchaser was, or the purpose for which he made the purchase. But in Section 205(e) Congress provided that only *some* overceiling sales, *not all* overceiling sales, should result in the imposition of a "penalty" against the seller.

No "penalty" is ever imposed by the section unless the sale was made to a buyer who purchased "for use or consumption *in* the course of trade or business".

Just What Is a Sale to a Buyer "For Use or Consumption in the Course of Trade or Business"— To-wit, the Only Type of Sale Which Renders a Seller Liable to the Imposition of the Penalty?

Now, it being too clear to admit of any serious argument, that no *penalty* could ever be imposed under Section 205(e) unless the overceiling sale was made to a buyer who purchased "for use or consumption **in** the course of trade or business", the sole question to be determined is whether that language ("for use or consumption **in** the course of trade or business") is plain, clear and certain, as is required for validity of penal acts or sections, or whether it is vague, indefinite and uncertain so that it might or could be subject to various meanings and interpretations by different persons. That is the test announced and repeatedly approved by the Supreme Court of the United States.

The language "for use or consumption in the course of trade or business" not only *might*, or *could*, have different meanings to different persons but it *has*

actually been variously understood and interpreted (or misunderstood and misinterpreted as the case may be) by many different persons, including many different United States District Courts over the nation. Without going into detail in the matter, we respectfully point out that under the interpretations, and decisions, in the *Silverman* case and the *Sieffs* case, the purchase of the robes worn by Your Honors on the bench, constitutes a purchase "for use or consumption **in** the course of trade or business", but under the *Molloy* case and the *Seminole* case the purchase of those robes was a purchase "for use or consumption **other** than in the course of trade or business"; while under the decision in the *Goggins* case the purchase of those robes might, or might not, constitute purchases "for use or consumption in the course of trade or business" depending largely on whether Your Honors purchase new robes at frequent, or at infrequent intervals; and under Judge Peirson Hall's views, the purchase of those robes would be "*other* than in the course of trade or business" unless they were purchased from a bootlegger or black market operator. And other District Courts have other and entirely different understandings and interpretations of the language in question.

Accordingly, if, as is so apparent, the language in question is not sufficiently clear and certain, that judges, men of intellect and education, highly trained in the use and usage of the English language, can agree upon its meaning, and if those men not only *might*, but *actually do* arrive at wholly irreconcilably conflicting understandings and interpretations of the particular language in question, can anyone seriously argue or contend that that language

is plain, clear and certain We think not. And we point out that under those circumstances business people and sellers of goods, generally, must simply "guess" at the meaning of the language—and of course "guess" at their peril. The law is too well settled to admit of any dispute, that where a penal section or provision is so vague or uncertain, with respect to the particular act (or standard of conduct) giving rise to the imposition of a penalty that a citizen or the public is not clearly informed as to what particular acts *do*, and what *do not* result in the imposition of the penalty, then that penal section or provision is invalid and void as in contravention of the due process clause. And that is the precise situation presented in the case at bar, with respect to the penal (Government suit) provisions of Section 205(e) as it existed prior to July 1, 1944.

The Interpretation of the Language by This Court Will Not Cure the Invalidity of the Penal Provision Which Was Void Ab Initio.

The validity or invalidity of the penal provision in question, must be determined as at the time of its passage. The provision in question, being penal, yet being also vague and uncertain, it was invalid and void *ab initio*—it was invalid and void *ab initio* because being penal, yet uncertain, it was beyond the power of Congress to enact. In other words it is the type and kind of enactment which, under the due process clause, Congress is *prohibited from enacting*.

Furthermore, assuming that all of the Honorable Judges sitting in this case can, and do, come to complete agreement as between themselves as to the proper meaning or

interpretation which *should* be put upon the language "for use or consumption in the course of trade or business," the fact will still remain that regardless of what that understanding or interpretation may be, many other men, including other judges, have already expressed themselves as entertaining an entirely different understanding of the meaning of that language. It is not possible for this Court to arrive at any understanding or interpretation of the language in question which will not be at variance, and irreconcilably so, with the interpretations of various other judges and Courts.

In the light of the numerous conflicting judicial interpretations which have already been placed upon the language in question, and the overwhelming conclusive proof of the uncertainty of that language, this Honorable Court has neither the legal or moral right to say or determine that the language in question is not vague and uncertain, or that it is not *capable* of different and conflicting meanings and interpretations.

It Makes a Difference.

Although we are concerned here solely with the penal provisions of the section, a question might arise in the mind of the Court as to whether it makes any difference to a seller whether he becomes liable for the imposition of the "penalty" provided by the section, or becomes liable to the buyer for the "remedial damages" which he may recover under the section.

Aside from the legal difference in character as between the two, and the different legal and constitutional requirements necessary to the validity of each, a very substantial practical difference exists. In the first place the "penalty" provided by the section is in favor of the Government;

and regardless of what name it may be called by, or whether it is recovered in a civil or criminal proceeding, that penalty is imposed as a punishment, and is in effect a fine; and even though it is recovered by the Government in a civil proceeding, the odor of criminality, culpability and disgrace attaches to it in so far as family friends, customers, the press and the public at large are concerned. That penalty is imposed and the odor of criminality and punishment attaches even though the overceiling sale was purely innocent or inadvertent and there was no wilfulness or culpability whatsoever on the part of the seller, whereas no odor or element of criminality or punishment attaches to a defendant in a civil suit for remedial or compensatory damages.

In the second place, in every action for the imposition and recovery of the penalty (Government suit), the defendant is deprived of numerous defenses which are available to him in an action by a purchaser for remedial damages under the section. For example, in an action by the purchaser, the seller may defend on the ground that the ceiling price had just been lowered, and that he (the seller) had no knowledge of the new ceiling, whereas the plaintiff, the buyer, had actual knowledge of the correct ceiling price; or the seller may defend upon the ground that the buyer was *in pari delicto* as to the transaction.

But in a suit by the Government for the enforcement of the penalty, the defendant (the seller) is *deprived of every equitable defense*. No equitable or special defense is available to him; he is limited to a general denial. He cannot even challenge the validity of the price or other regulation which he is accused of having violated. Consequently, it cannot be contended that it is of no concern or importance to a seller, whether he is a defendant in a

purchaser's suit for "remedial damages" or is obliged to defend a "penalty" suit by the Government. It makes a very great difference.

Wherefore, the Petitioner prays that this Honorable Court grant certiorari and reverse the judgment of the Circuit Court and affirm the judgment of the District Court.

Respectfully submitted,

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SUPPLEMENT.

[¶51,118] Chester Bowles, Administrator, Office of Price Administration, Plaintiff, v. Adolph Silverman, Defendant.

United States District Court, District of South Dakota. Civil No. 108. March 9, 1944.

Farming is a business within the purview of the Emergency Price Control Act and purchases of farm machinery for use or consumption in the farming operations of the purchasers are purchasers for use or consumption in the course of their trade or business so that, in case of overcharges, the right of action under Sec. 205 (e) of the Act vests in the Price Administrator.

Back references.—¶41,075, 41,080.

Clifford A. Wilson, Esq., Charles E. Sutcliffe, Esq., Sioux Falls, S. D., for Plaintiff.

Messrs. Morrison & Skoug, Mobridge, S. D., for Defendant.

Wyman, D. J.: I have had under consideration the questions raised by plaintiff's motion to strike portions of the defendant's answer, and the defendant's motion to dismiss the above entitled action, and have carefully examined the pleadings together with the briefs submitted by counsel in support of their respective contentions.

It appears by defendant's motion that it is bottomed upon three separate grounds, but as no mention is made of ground No. 3 in the brief, I assume that it has been abandoned. The other two grounds, while stated separately, are so closely related, each being, in effect, a challenge to the jurisdiction of the Court, that they may well be considered together.

For the purposes of the motions the allegations of the complaint must be regarded as true. It therefore appears that each of the combines mentioned in the complaint was purchased by each of the respective persons named in the complaint from the defendant at the times and place respectively set forth in said complaint; and that the respective prices paid for said combines were all in excess of the maximum or ceiling prices established by the maximum price regulation.

It further appears that each of said combines was purchased for use by each respective purchaser in and about the operation of his farm.

It is the contention of the defendant that under this state of facts the plaintiff is not authorized to bring this action and that such right is vested exclusively in the respective purchasers. The question thus presented must turn upon the construction of Sec. 202 (e) of the Emergency Price Control Act of 1942, which, in so far as the same is applicable reads as follows:

"If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action * * * If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, and buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action. * * *"

The wording of the statute, it seems to me, leaves no room for doubt that if the purchases involved here were made for use or consumption in the course of the trade

or business of the respective purchasers, the Administrator is exclusively authorized to bring this suit.

Defendant contends that the statute should not be construed so as to bring the occupation of farming within the purview of the exception clause of the statute as a trade or business. He argues that this is a penal statute and should be strictly construed in favor of the defendant, and that farming is neither a trade or business within the meaning or purpose of the act. He presents a very rational and persuasive argument to the effect that a farmer who buys a machine for use in his farming operation, with no thought of profiting by resale should, for the purposes of the Act, be distinguished from a merchant or trader who buys a commodity for the purpose of profiting by resale. Logically there is much force to this argument. It would seem fair and reasonable that the individual who sustains the loss or damage should be vested with the right to sue. The farmer who buys needed equipment as an ultimate consumer, with no thought of resale is damaged to the extent of the excess in the price, but the man who buys for the sole purpose of profiting by a resale sustains no damage because the excess in price will be passed on to the one who buys from him, and therefore he should not be granted the right to sue.

Notwithstanding the logic and persuasiveness of defendant's argument as to how the statute should be construed, a Court is to interpret the law as it is written, and is not permitted to substitute his idea of what the law should be for that which it clearly states. It is true that this statute in its nature is a penal statute, at least in so far as the defendant is concerned, and therefore should be strictly construed, but there is nothing

in this well-recognized rule of construction which would warrant a Court in doing violence to clear and unambiguous language. All that is required is that words be given their fair and ordinary meaning in view of the avowed purpose and intent of the law makers. To me, the wording of this statute is clear and unambiguous and without citing any of the abundant authorities, I have no hesitancy in holding that farming is a business within the ordinary meaning of the word as used in the statute under consideration, and if the several purchases here involved were made for use or consumption in the farming operations of the respective purchasers they were made for use or consumption in the course of the trade or business of the respective purchasers. The purchasers, therefore, would have no right to sue the seller under the statute, but that right is exclusively vested in the plaintiff administrator. It follows, therefore, that defendant's motion to dismiss must be denied, and the plaintiff's motion to strike must be sustained.

Upon presentation of proper orders in line with the foregoing, and allowing twenty days to defendant within which to file and serve an amended answer, the same will be signed and entered of record.

I am returning to each of you herewith your memo briefs which were of great assistance to the Court.

[¶51,131] Prentiss M. Brown, Administrator, Office of Price Administration, Plaintiff, v. J. Carroll Molloy, et al., Defendants.

United States District Court, Eastern District of Pennsylvania. No. 3302, Civil Action. March 10, 1944.

In an action for an injunction against auctioneers who sold used farm equipment at prices above those prescribed by the price regulation establishing maximum prices for farm machinery, the court denied the Administrator's request for an injunction because the auctioneers made earnest efforts to determine the applicability of the regulations and to follow a course of sale which they believed would not be in violation thereof; they are not likely to commit any further violation, and they are, therefore, entitled to continue in their careers, without the possible reflection upon them which might arise from the existence of a federal injunction.

Back reference.—¶41,071.

A private buyer who purchases for his own use or consumption is given the right to recover compensation (treble damages) for the unlawful advantage taken of him by the seller in exceeding the selling price, but a dealer or other person in the trade or business who purchases above the ceiling price needs no such protection and is not given the same privilege; therefore, the Administrator, on behalf of the United States, is not entitled to recover treble damages for an auctioneer's alleged violation of the maximum price regulation.

Back reference.—¶41,075.

[Violations Charged]

Welsh, J.: This action is brought under the provisions of the Emergency Price Control Act, Public Law 421, 77th Congress, 2nd Session, Chapter 26; 50 U. S. C. A., Appendix 925. The Administrator of the Office of Price Administration charges that the defendants sold used farm equipment at prices above those prescribed by Price Regulations No. 133, and amendments, promulgated by the O. P. A. establishing maximum prices for farm machinery and other commodities.

[Pertinent Statutory Sections]

Section 205 (a) of the Act provides:

"Whenever in the Judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Section 205 (e) provides:

"If any person selling a commodity violates a regulation, order, or price schedule * * * the person who buys such a commodity for use or consumption other than in the course of trade or business may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater, plus reasonable attorney's fees and

costs as determined by the court. * * * If * * * the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States."

The Administrator seeks in this action an injunction against the defendants under Section 205 (a) and triple damages amounting to $4293.69 under Section 205 (e).

* * * * * * * * *

[*Claim for Treble Damages*]

As to the Administrator's claim on behalf of the United States for treble the excess over the ceiling price, we conclude upon the same principles and equitable considerations, that no recovery should be allowed, and the claim is denied.

It might be noted in passing that there is substantial doubt as to the propriety of the Administrator's claim. The language of the Act very clearly gives the right of recovery to "the person who buys such commodity for use or consumption" as distinguished from those who buy "in the course of trade or business". We take those phrases to mean that a private buyer who purchases for his own use or consumption is given the right to recover compensation for the unlawful advantage taken of him by the seller in exceeding the selling price. But a dealer or other person in the trade or business who purchases above the ceiling price needs no such protection and is not given the same privilege. Numerous reasons may be assigned as the basis of the distinction. A dealer or per-

son in the trade is presumed to know the ceiling price to the same extent as the seller. Such persons should not be given the opportunity of making purchases at an agreed excessive price and then be allowed to recover back any part of the price by a suit based upon a violation in which he was a participating party. These and other possible situations suggest the propriety and purpose of the distinction between the classes of buyers mentioned in the Act.

The Administrator's construction of the language assumes that in order to obtain the benefit of the provision the buyer must be one "who buys such commodity for use or consumption other than in the course of trade or business". There would seem to be no logical reason for restricting the privilege to only those persons who buy articles for uses not in any way connected with their trade or business. Such interpretation would mean that a purchaser of a tractor for use on his farm would not be entitled to the redress provided. but a purchaser who bought the same kind of appliance for use in the cultivation of his private estate not maintained as a business would have the right to recover treble the overcharge. This interpretation is strained and illogical and we would not be disposed to adopt it. Subordinating the phrase "other than in the course of trade or business" to the other thoughts expressed in the sentence, seems to clarify its meaning and to justify our impression of what was intended.

The injunction and recovery demanded are denied and the bill is dismissed.

[¶51,122] Chester Bowles, as Administrator of the Office of Price Administration, Plaintiff, v. Seminole Rock and Sand Company, a Corporation, Defendant.

United States District Court, Southern District of Florida, Miami Division. Civil No. 896-M. March 28, 1944.

Section 205 (e) of the Emergency Price Control Act does not authorize treble damage actions by the Price Administrator under any circumstances—the right to bring such actions being vested only in ultimate consumers.

Back reference.—¶41,075.

Injunctive relief to restrain violations of a price ceiling is denied in the exercise of judicial discretion where compliance with the ceiling would entail selling at a loss maintenance material required by an essential railroad.

Back reference.—¶41,071.

AKERMAN, D. J.: In this case the OPA Administrator filed a complaint against the defendant in two counts, each count alleging a violation of the ceiling prices on crushed rock [under Maximum Price Regulation No. 188]; the first count praying for an injunction and the second count praying for treble damages aggregating some $130,000.00. The suit was filed (if the Court is correct in its recollection) in Oct. 1943. The defendant filed certain affirmative defenses in the nature of a cross bill, praying an injunction against the Administrator. As far as the Court is advised, there had been nothing done on the part of the plaintiff to bring the case to a conclusion until in February, when this particular Judge was in Miami, the defendant's counsel set the case down for

a hearing on his answer in the nature of a cross bill and on his motion to dismiss, at which time the Court heard testimony and arguments and came to the conclusion that the ends of justice would be best subserved by not ruling on any of the preliminary matters at that time, setting the case down for final hearing, and such is the hearing now before the Court. The Court has now heard all of the testimony and the arguments of counsel.

If it were necessary to pass upon the constitutional questions raised in the answer, the Court would be compelled to take the case under advisement until I compared the decision rendered by the Supreme Court on yesterday with the point in this case. If this decision had not been rendered the Court would not have been compelled to pass upon the constitutional question, because a Court will never declare an act of Congress unconstitutional in a case that can be determined without such declaration.

We will first take up the second count, considering the two counts in inverse order. The Court is of the opinion that no cause of action has accrued to the Administrator for this excessive charge, assuming that it was excessive. As I construe the statute, the statute was aimed to give the ultimate consumer an action for three-fold damages. It makes no difference whether that ultimate consumer is the housewife purchasing a can of soup or the railroad purchasing a hundred thousand dollar Diesel engine. The object was two-fold. First, if the merchant or middleman in purchasing from the jobber or

manufacturer was *particeps criminis* to the excessive charge, he could pass it down and would have been able to pass it down to the ultimate consumer, therefore, it would have been iniquitous to give him the right to recover three-fold damages when he was as deep in the mud as the manufacturer in the mire; but the ultimate consumer had no place to pass it on and no temptation to pass it on, and therefore the ultimate consumer is who they mean "in the course of trade or business". They could have used more understandable language, but I construe it to mean "ultimate consumer". In addition to that, for reasons which will be stated when I come to consider the first count, the second count will have to be dismissed on both grounds.

In the Supreme Court of the United States

October Term, 1944

No. 1224

Bee Ray and Nathan Forbes, etc., Doing Business as Superior Uniform Cap & Shirt Mfg. Co., petitioners

v.

Chester Bowles, Administrator, Office of Price Administration

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The complaint, filed on September 1, 1943, alleges in substance that from January 27, 1943, to June 21, 1943, petitioners sold and delivered brass emblems for garrison caps at prices in excess of the maximum prices established therefor by the General Maximum Price Regulation; that none of such brass emblems were purchased for use or consumption other than in the course of trade or business; that the total amount by which the prices at which the emblems were sold exceeded the maximum prices established by the General Maximum Price Regulation was $1,276.20.

Judgment was demanded for three times that amount or $3,828.60 (R. 2–3).

Petitioners moved to dismiss the complaint on the ground, among others, that the complaint failed to state a claim upon which relief could be granted (R. 5–6). The district court sustained the motion and dismissed the complaint (R. 7, 10–12).

On appeal, the circuit court of appeals reversed the judgment on the authority of its decision in *Bowles* v. *Glick Brothers Lumber Co.*, 146 F. 2d 566 (R. 29, 146 F. 2d 652).

The questions presented by the petitioners in this case are the same as those involved in *Glick Brothers Lumber Co.* v. *Bowles*, No. 1213, this Term, except that in this case there is no issue as to a suppression of evidence.[1] For the reasons stated in the Brief in Opposition in that case, the petition for a writ of certiorari should be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

FLEMING JAMES, JR.,
Director of Litigation Division,

DAVID LONDON,
Chief of the Appellate Branch,

A. M. DREYER,
Attorney,
Office of Price Administration.

MAY 1945.

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[1] The questions numbered 3 and 4 in the Brief in Opposition in the *Glick Brothers* case (p. 2) are thus not involved.

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